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No. 76-1641

In the Supreme Court of the United States

OCTOBER TERM, 1977

EDMUND A. ROSNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that the district court improperly considered his original sentence, which had been vacated by the court of appeals, in determining a new sentence on remand.

1. Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiracy, in violation of 18 U.S.C. 371, obstruction of justice, in violation of 18 U.S.C. 1503 and 2, and three counts of bribery, in violation of 18 U.S.C. 201(b) and 2. He was sentenced to concurrent terms of five years' imprisonment on each count. The court of appeals affirmed the conviction, but it vacated the sentence and remanded for resentencing by another

judge. 485 F. 2d 1213, certiorari denied, 417 U.S. 950 (Pet. App. 1a-2a).[1]

The court of appeals ordered a resentencing because, in fixing petitioner's original sentence, the district court had relied in part on a lengthy sentencing memorandum from the United States Attorney that had outlined some 17 additional allegations of misconduct by petitioner, many of which admittedly were impossible of formal proof. Although the district court had been in possession of the memorandum for several weeks, petitioner only became aware of it on the date of sentencing. Nonetheless, petitioner had been denied a continuance to study the document, and as a result he was unable to rebut its allegations. The court of appeals directed the resentencing judge either to decline to read the memorandum or, if he thought it useful to consult the document, to permit petitioner an opportunity to rebut it (Pet. App. 2a-4a).

On remand, the district court chose not to read or rely on the memorandum. Rather, it considered the presentence report from the probation authorities, the opinion of the court of appeals, and a second sentencing memorandum prepared by the government. In addition, the court took into account petitioner's original sentence of five years' imprisonment because it believed that the first sentence was "one of the many factors to be considered * * * in arriving independently at a sentence * * *" (Pet. App. 3a). Based upon all of these factors, the court sentenced petitioner to concurrent terms of three years' imprisonment on each count (*id.* at 2a).

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[1]Petitioner also moved for a new trial while his direct appeal was pending on petition for a writ of certiorari. The district court denied the motion, the court of appeals affirmed (516 F. 2d 269), and this Court denied review (427 U.S. 911).

Petitioner thereafter moved to vacate or reduce his sentence pursuant to Rule 35, Fed. R. Crim. P., and 28 U.S.C. 2255, contending that the sentence imposed on remand was illegal because the resentencing judge had considered the length of the original sentence. The district court denied the motion and the court of appeals affirmed (Pet. App. 1a-9a).

2. Petitioner contends that he was denied due process because the district court on remand relied to some extent on petitioner's original sentence, which had been influenced by "the prosecutor's unrebutted pre-sentence memorandum" (Pet. 7). As the court of appeals noted (Pet. App. 4a), however, "we remanded the case not because [the sentencing judge's] reliance on the government's sentencing memorandum was per se improper but simply because [petitioner's] counsel was not given the opportunity to rebut the 17 extraneous allegations of other wrongdoing it contained." On remand, the district court refused to read the sentencing memorandum, a refusal that eliminated any possibility of a recurrence of the error that had infected petitioner's initial sentencing and that (as the court below remarked) "supports our conclusion that [the resentencing judge] reached his determination independently" (*id.* at 9a, n. 7).

The fallacy of petitioner's argument is that it equates consideration of the length of his original sentence with consideration of the original sentencing memorandum, although the first sentence imposed on petitioner obviously was the product of a great many other factors on which the district court on remand was entitled to rely. Since the resentencing judge did not read the original sentencing memorandum and considered the original sentence only for the purpose of assessing the trial judge's belief in petitioner's culpability (Pet. App. 5a), the court of appeals correctly rejected petitioner's claim as nothing more than the "bald proposition that the new sentence

[was] vitiated per se by [the resentencing judge's] consideration of [the] prior sentence" (*id.* at 5a-6a).[2] Indeed, since the second sentence imposed on petitioner represented a substantial reduction of the first sentence, any contention that the resentencing judge was indirectly influenced by the original sentencing memorandum is particularly unpersuasive. In sum, the court of appeals properly concluded that the district court "conscientiously and meticulously followed the remand of this court and that [it] carefully enumerated the reasons which prompted [it] to set a more lenient sentence. * * * [W]e find no error in the procedure [it] adopted and no dependence upon improper criteria" (*id.* at 7a).[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

JULY 1977.

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[2]If petitioner believed, contrary to the district court's representations, that the original sentencing memorandum was being considered on remand, he had more than a year to examine the memorandum and to indicate its alleged inaccuracies.

[3]Although petitioner suggests that the decision below is inconsistent with decisions of other circuits (Pet. 5-6), each of the cases on which he relies involved either the use of misinformation of constitutional magnitude (see, *e.g.*, *United States* v. *Tucker*, 404 U.S. 443) or a lack of opportunity by the defendant to rebut information on which the court had relied in imposing sentence (see, *e.g.*, *Collins* v. *Buchkoe*, 493 F. 2d 343 (C.A. 6)). The district court in this case relied exclusively upon legitimate sources of information to which petitioner had a full opportunity to respond.

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